IN THE SUPREME COURT

Appeal from the Court of Appeals

ESTATE OF EUGENE T. CAPUZZI, M.D.,
deceased,
_____/

MICHAEL CAPUZZI and EUGENE T. CAPUZZI, JR.,

Plaintiffs-Appellants,

v

CHRISTINA FISHER,

Defendant-Appellee.

SC 121106
COA: 227750
CC: 99-011693-SE

_____

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BRIEF ON APPEAL-APPELLANTS

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STATEMENT OF BASIS OF JURISDICTION OF MSC AND STANDARD OF REVIEW

This case is before the Michigan Supreme Court and within its jurisdiction after Appellants' application for leave to appeal was granted by an order of this Honorable Court dated June 27, 2003.

This case arises from a summary disposition judgment entered in the Cheboygan County Probate Court on the Appellants' motion to adjudge certain joint venture shares non-estate assets. The standard of review for summary disposition motions is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). However, the standard of review for estate petitions requires the abuse of discretion standard. *In re Rice Estate*, 138 Mich App 261, 269-270; 360 NW2d 587 (1984).

STATEMENT OF QUESTIONS PRESENTED

ISSUE I.

WHETHER THE DEATH OF THE PRINCIPAL REVOKES THE AGENT'S ORDER TO TRANSFER JOINT VENTURE SHARES THAT WAS UNCOMPLETED BY A THIRD PARTY?

Appellants answer, "No."
Appellee answers, "Yes."
Trial court ruled, "No."
Court of Appeals ruled, "Yes."

ISSUE II.

WHETHER THE PRINCIPAL'S DEATH WOULD HAVE REVOKED THE ORDER TO TRANSFER THE JOINT VENTURE SHARES THAT WAS UNCOMPLETED BY A THIRD PARTY IF THE PRINCIPAL HIMSELF HAD REQUESTED IT?

Appellants answer, "No."
Appellee answers, Unknown.
Trial court did not address this issue.
Court of Appeals did not address this issue.

ISSUE III.

WHETHER THE FACT THAT THE THIRD PARTY FAILED TO COMPLETE THE TRANSFER TRANSACTION BEFORE THE PRINCIPAL'S DEATH COMPELS THE CONCLUSION THAT THE NON-TRANSFERRED SHARES REMAINED IN THE PRINCIPAL'S ESTATE, REGARDLESS WHETHER THE AGENT RETAINED HIS POWER OF ATTORNEY OR WHETHER HIS PAST AUTHORIZED ACTS REMAINED VALID AFTER THE PRINCIPAL'S DEATH?

Appellants answer, "No."
Appellee answers, "Yes."
Trial court ruled, "No."
Court of Appeals ruled, "Yes."

STATEMENT OF FACTS

(Pursuant to MCR 7.212(C)(6)

Dr. Eugene T. Capuzzi, M.D. died on August 14, 1998 in Cheboygan, Michigan. He is survived by his wife of forty-four years, Mary Grace Capuzzi, and three children: Eugene Jr., Michael, and Christina. Appendix 22a-23a.

Two years prior to his death, Dr. Capuzzi appointed his son, Michael, a lawyer, as his attorney-in-fact in a Power of Attorney (POA) instrument to help his wife and himself in financial and legal affairs during their twilight years. Appendix 22a-23a.

Michael Capuzzi completed three transfers at the specific requests of his father. Appendix 20a. On June 29, 1998, he transferred Churchill Downs stock, Equitable Company, Inc. stock, and General Electric stock to Mary Grace Capuzzi. On August 10, 1998, he transferred all Northville Driving Club stock to the Mary Grace Capuzzi Revocable Living Trust Agreement at the request of his father. Appendix 20a. And on August 10, 1998, Michael Capuzzi transferred the remaining joint stock shares in a racetrack operation from his father to the two sons. Appendix 21a.

Acting on these instructions, Michael telephoned and faxed a copy of the Power of Attorney along with specific written instructions to transfer the remaining shares at the request of his father. Appendix 14a. Pursuant to the business customs and practice of the partnership, all that is necessary to transfer

partnership shares is a direct communication either by telephone or in writing, as stated in the affidavit of Margaret J. Zayti, executive manager of Northville Downs. Appendix 16a-17a. Delivery, acceptance, or re-issuance of certificates is *not* required.

The Northville Downs received Michael's communication on August 10, 1998. Four days later, Dr. Capuzzi died. On August 19, 1998, Northville Downs mailed a letter to Michael stating that it had not completed the book transfer prior to the death of Dr. Capuzzi, and therefore, it would not complete the transaction pursuant to the agent's instructions. Appendix 15a.

During the two year period prior to his death, the daughter became estranged from her parents and the family. She refused to visit or telephone her father at his residence or the hospital after he fell ill despite pleading from her mother and friends. Appendix 23a. According to the sworn affidavit of Mary Grace Capuzzi, the heirs' mother, she was present when Dr. Capuzzi instructed Michael Capuzzi to transfer the partnership shares and that her husband did not want his daughter to have any of the shares. Appendix 23a.

After an estate was opened in the Cheboygan County probate court, a dispute arose concerning whether the joint stock shares were estate assets or personal property belonging to the sons. The personal representative, the mother, maintained a neutral position

suggesting that the dispute was a question of law for the trial court to resolve. Appendix 27a. The sons successfully argued that the joint stock shares were properly transferred to the sons prior to their father's death. The daughter, however, claimed that the joint stock shares were estate assets because the transfer was not completed by the racetrack on their ledgers.

The Appellants filed a motion, supporting documentation, and brief for summary disposition pursuant to MCR 2.116(C)(10) on February 11, 2000 arguing that there are no genuine issues in dispute and that as a matter of law, judgment should be entered in their favor adjudging the partnership shares as non-estate assets. Appendix 29a-32a. The hearing on this motion was held March 16, 2000. The trial court granted the Appellants' motion for summary disposition. Appendix 7a-8a.

The Court of Appeals reversed and remanded this case in an unpublished per curiam opinion released February 15, 2002. Appendix 9a-11a. It ruled, *inter alia*, that if the principal had been alive, then he could "have cancelled the transaction, because it was not completed," and therefore, because he had died and the transaction not completed during his lifetime, then the transaction was void.

The Appellants timely filed their application for leave to appeal, and the same was granted by this Court.

ISSUE I.

WHETHER THE DEATH OF THE PRINCIPAL REVOKES THE AGENT'S ORDER TO TRANSFER JOINT VENTURE SHARES THAT WAS UNCOMPLETED BY A THIRD PARTY?

Appellants answer, "No."
Appellee answers, "Yes."
Trial court ruled, "No."
Court of Appeals ruled, "Yes."

The Power of Attorney subject to this case grants Michael Capuzzi (hereinafter referred to as "Agent"), the "full power and authority to do and perform every act and thing whatsoever requisite and necessary to be done." Appendix 13a. In this case, the Agent instructed Northville Downs (hereinafter referred to as the "Third Party"), on August 10, 1998 as follows:

> "Pursuant to my father's wishes as well as the enclosed Durable Power of Attorney please cause ownership, and all rights and responsibilities, of the remaining five shares of the John J. Carlo Limited Partnership to be distributed to the individuals named below in the following proportions:
>
> | SHARES | TRANSFEREE |
> |---|---|
> | 2.5 | Michael Anthony Capuzzi |
> | 2.5 | Eugene T. Capuzzi, Jr. |
>
> * * *"

Appendix 14a.

Pursuant to the business customs and practices of the Third Party, all that was required and necessary for an owner to transfer title in the partnership shares was by written or electronic

communication. This fact is supported by the Executive Manager for the Third Party, Margaret J. Zayti, who states in her affidavit:

> "(6) That the regular business practice of this joint venture for the transferring of interests by a share owner has been by written letter or telephone communication directing a transfer, as was the case in December, 1991 when Dr. Eugene Capuzzi informed the joint venture to transfer one (1) unit to each of his three (3) children." Appendix 16a-17a.

This business practice is corroborated by the affidavit of Attorney John C. Griffin, Jr., who served as attorney and attorney in fact under a durable power of attorney for Dr. Capuzzi (hereinafter referred to as the "Principal"). Attorney Griffin states in relation to his instructions to transfer shares:

> "To my knowledge, the transfer was effected solely as a result of this request." Appendix 18a.

In sum, the Agent fully performed all acts and things that he or the Principal could have done to assure that the transfer occurred. Neither the Agent nor the Principal had to wait for re-issuance of documents; to accept delivery; or to receive a written acknowledgment of the new ownership transfers. The Third Party had in its possession the transfer; it merely had to note the transfer on its ledger or book. The latter is a mere ministerial act that cannot hinder or halt the Principal's intentions.

The general principles of agency law as it pertains to the death of a principal is set forth in Restatement Agency, 2d, § 120 Death Of Principal:

(1) The death of the principal terminates the authority of the agent without notice to him, except as stated in subsections (2) and (3) and in the caveat.

(2) Until notice of a depositor's death, a bank has authority to pay checks drawn by him or by agents authorized by him before death.

(3) Until notice of the death of the holder of a check deposited for collection, the bank in which it is deposited and those to which the check is sent for collection have authority to go forward with the process of collection.

Caveat:

No inference is to be drawn from the rule stated in this Section that an agent does not have power to bind the estate of a deceased principal in transactions dependent upon a special relation between the agent and the principal, such as trustee and beneficiary, or in transactions in which special rules are applicable, as in dealings with negotiable instruments.[1]

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[1] Comment:

a. Rationale. Agency is a personal relation, necessarily ending with the death of the principal; the former principal is no longer a legal person with whom there can be legal relations. One cannot act on behalf of a non-existent person. Further, to the extent that agency is a consensual relation, it cannot exist after the death or incapacity of the principal or the agent. This was the common law viewpoint and consistent with the older theory as to contractual relations to the effect that the minds of the parties must "meet" before a contract can be made. From this point of view, an agreement that an agency should continue after the death of the principal is a legal impossibility.

However, the fact that the personal relation terminates does not prevent the existence of a power to bind the estate of the deceased. It is not illogical to say that authority, which is a power based upon the manifestations of the principal, shall continue to be effective with reference to the estate of the deceased until notice. When the agent has notice of the death, there is a manifestation that this power is terminated. Without such notice, however, both justice and expediency require that the former agent should be entitled to act as he has reason to believe

The death of the Principal does not revoke the transfer order. The transfer order and the durable power of attorney were already

---

the principal wishes him to.

In support of the existing rule, it can be said that since no one promises to live, the agent "takes the risk" that the principal is still alive. Technically the situation is not the same as that which requires notice of revocation by a live principal. On the other hand, however, agency is a business relation and, in general, responds to the needs of business rather than remaining consistently logical. For an agent employed to do business, the common law result presents dangers from either action or inaction.

If his principal is alive, the agent is under a duty to act, since that is what he is employed to do. Normally, one in a position in which he has a duty to act on facts reasonably known to him is protected if he makes a reasonable mistake, as in the case of a sheriff who mistakenly arrests a person whom he reasonably suspects has committed a felony. If the agent reasonably believes his principal to be dead, he is protected if he does not act, and the same should be true when he acts in justifiable ignorance of the death. It is true that he can contract with the principal for indemnity in case he is made liable to third persons for acting without power to bind (see § 438, Comment f), but that is a precaution which would seldom be taken. Further, this precaution would protect only indirectly an innocent third person also ignorant of the death. As between the risks to the estate and the harm to business which results from the common law rule, the protection of business is preferable.

For these reasons the courts have begun to make inroads upon the generality of the rule, and hence it is proper to make the statements in Subsections (2) and (3) and the Caveat. Legislation in many states, providing that powers of attorney given by servicemen before leaving for war are effective to protect both the holder and persons dealing with him, until notice of death, also tend to indicate the gradual breaking down of the common law rule.

However, it still continues to be stated broadly by most of the American courts, in decision and dicta, that the death of the principal terminates the authority of the agent. A few courts have held that the agent has power to bind the estate of the principal until the agent has notice of death.

in the possession and control of the Third Party. The Third Party was obligated to complete the authorized transaction. The Principal was not going to receive anything from the Third Party.

The death of a principal revokes the *ability* or the authority of an agent to act any further. In this case, nothing further was required or necessary on the part of the Agent. Both the Principal and the Agent were essentially dependent on the acts of the Third Party to perform as a result of the authorized transfer order. If this was a transaction that required either the Principal or the Agent to have to respond or react to the actions of the Third party to complete the transaction, such as verification of an account, acceptance of delivery, or final payment of debt, then the death of the Principal would have only revoked the Agent's ability and authority to act. Of course, the Agent's authorized act would have bound the estate of the Principal, which in effect could ratify the uncompleted act.

ISSUE II.

WHETHER THE PRINCIPAL'S DEATH WOULD HAVE REVOKED THE ORDER TO TRANSFER THE JOINT VENTURE SHARES THAT WAS UNCOMPLETED BY A THIRD PARTY IF THE PRINCIPAL HIMSELF HAD REQUESTED IT?

Appellants answer, "No."
Appellee answers, Unknown.
Trial court did not address this issue.
Court of Appeals did not address this issue.

The facts and circumstances of this instant case may be unique in and of themselves. First, this case sets forth a standardized business practice that allows for the transfer of shares by a certain method that was followed by the Agent. Second, this transaction was initiated by a person knowing that he did not have long to live and knowing that his only daughter had hurt the family. According to his widow:

> "(8) That I was present when my husband requested and instructed Michael to transfer the five joint venture shares from himself to Michael and Eugene in equal shares.
>
> (9) That my husband died not wanting our daughter to receive the joint venture shares; he also wanted to divest himself of all remaining assets so to avoid probate." Appendix 23a.

Whether the Principal in the instant case signed a transfer letter and faxed it to the Third Party himself would have no bearing on his ability to rescind or cancel the transfer. According to the business practices, transfers that are directed to be made by written or telephonic instructions was all that was

necessary.

Pursuant to case law pertaining to inter vivos gifts, three elements must be established. Generally, three elements must be satisfied for a gift to be valid: (1) the donor must possess the intent to transfer title gratuitously to the donee, (2) there must be actual or constructive delivery of the subject matter to the donee, unless it is already in the donee's possession, and (3) the donee must accept the gift. If a gift is beneficial to the donee, then acceptance is presumed. *Davidson v Bugbee*, 227 Mich App 264, 268; 575 NW2d 574 (1998).

A valid gift of securities inter vivos may be effective without a written assignment. *Cook v Fraser*, 298 Mich 374; 299 NW 113 (1941).

The transmission of certificates of stock to the corporation or transfer agent for transfer on the corporate books has been treated as sufficient delivery of a gift, and a gift of stock was held completed at the time of such transmission, all other elements of a gift also being present.

In *Dulin v Commissioner*, 70 F2d 828 (CA6, 1934), a gift of corporate stock was held valid when a husband delivered the certificate to the corporation's transfer officer with instructions to transfer the stock to his wife on the corporation's books. Even though the certificate was not indorsed nor the transfer actually made until a later date. The *Dulin* Court held that the delivery of the stock to the transfer agent was said to be a delivery of the

stock to the corporation for the purpose of transfer, as trustee for the donee. The delivery of the stock to the transfer agent with specific instructions were said to be a complete surrender of control or dominion of the stock by the donor, and effectuated the gift on the date of delivery.

In *Merner v Commissioner*, 32 BTA 658, petition dismissed 79 F2d 985 (CA9, 1935), a husband mailed a certificate for 300 shares to the transfer agent in New York on December 30, 1920, with instructions to issue one certificate for 150 shares to his wife and another certificate for a like number to himself, both certificates to be dated December 30, 1920. The transfer agent did not actually issue the new certificates until January 3, 1921. In an action the issue of whether the husband intended to make a gift of the stock to take effect in 1920 was addressed. The tax board held that delivery was complete in 1920. The fact that the husband became repossessed of the new certificates, which were placed in a safe deposit box jointly held by the husband and wife, was said to have no significance, since a valid gift inter vivos had already been accomplished.

In *Mein v Commissioner*, TCM 8/14/46, a donor on December 29, 1938, mailed stock certificates, endorsed in blank, with instructions to register the stock in the names of trustees of trusts for his four children. One letter was not received until 1939. The time of receipt of the other letter was not shown. The new certificates in the names of the trustees were received by the donor in 1939 and were sent by him to the trustees in 1939. In an

action for a gift tax deficiency for 1939, the donor contended the gifts were completed in 1938. Stating that delivery may be made to a third person for the benefit of the donee, and reasoning that delivery, *coupled with instructions to transfer the stock*, was a delivery to the corporation as trustee for the donees, the court held the gifts were complete in 1938.

In the *Matter of Maijgren's Estate*, 193 Misc 814, 84 NYS2d 664 (1948), a probate proceeding concerning the ownership of 119 shares of corporate stock as estate assets or as inter vivos gifts made during the life of the owner addressed the issue of a completed gift on the owner's letter to the donee. The owner had mailed a letter to his wife along with the stock certificates instructing her that she could have the certificates transferred at any time. These certificates were not endorsed by the owner and no stock stamps were affixed to them. The *Maijgren* Court held

> The burden of proof is upon claimant. Testator's letter of transmittal of the stock, admissible as an admission against interest, was quoted above in part. It shows delivery of the stock with the intent that claimant could have the certificates transferred to her name at will. It also shows intent to vest the title, equitable if not legal to the stock in claimant, because testator wrote to his wife that 'the children should be informed that their father is not a thief and be advised of the evidence and the 'restitution' attached hereto.' The 'restitution' was the revesting of the ownership of the stock in claimant. His intent at the time could hardly be more clearly expressed. Although failure to endorse the certificates has a bearing upon testator's intention at the time, the whole expressed purpose of the return of the stock, to wit, to remove claimant's ground for complaint against the testator and to show his children that he had not 'existed and prospered through underhanded methods and through your (claimant's) and your mother's bounty' conclusively establishes his intention to make a presently completed gift in equity.

> Thus, if testator had died within a few days after the date of such letter, little doubt could be raised that the gift was complete. The books are full of reported cases embodying this principle. A good illustration is *Matter of Cohn*, 187 App Div 392, 176 NYS 225 which cites many cases on the subject. *Id.* at 671.

The *Maijgren* Court then held that the transmittal of the unendorsed certificates along with the letter of intent completed the gift:

> The gift having been effectuated, it was irrevocable by testator. [citations omitted]. His later refusal to endorse the certificates, whatever his reason, and his later entries in the corporate minute book and statements in the corporate tax reports indicating his ownership of the stock could not recall the gift. *Id.* at 671.

In the instant case, written instructions and the durable power of attorney were delivered and received by the Third Party. No cancellation or re-issuance of share certificates were required by the Third Party. Because of the business practices in this case, once the Agent transmitted the transfer instructions directed by his Principal, the Principal's ability to cancel or revoke this instruction was terminated. If, on the other hand, re-issuance of share certificates was a requirement to complete the transaction, then the Principal still had the power to cancel the transaction before re-issuance.

ISSUE III.

WHETHER THE FACT THAT THE THIRD PARTY FAILED TO COMPLETE THE TRANSFER TRANSACTION BEFORE THE PRINCIPAL'S DEATH COMPELS THE CONCLUSION THAT THE NON-TRANSFERRED SHARES REMAINED IN THE PRINCIPAL'S ESTATE, REGARDLESS WHETHER THE AGENT RETAINED HIS POWER OF ATTORNEY OR WHETHER HIS PAST AUTHORIZED ACTS REMAINED VALID AFTER THE PRINCIPAL'S DEATH?

Appellants answer, "No."
Appellee answers, "Yes."
Trial court ruled, "No."
Court of Appeals ruled, "Yes."

The sons petitioned the probate court for an adjudication that the joint venture shares were not property of the estate, and were, in fact, their personal property. The trial court ruled in favor of the sons, and as a result, the Third Party transferred the shares to the names of the two sons in equal parts. The sons receive annual dividends and all the benefits that the shares provide. Whether the Third Party wrote in its ledger the sons' names is of no consequence once it received the transfer instructions and durable power of attorney. The Principal's ownership rights became irrevocable and the sons' title rights secured.

To illustrate, in *McLean v Charles Wright Medicine Co*, 96 Mich 479; 56 NW 68 (1893), where a purchaser and possessor of 555 of corporate stock instructed the corporation to transfer his ownership rights on the corporate books, and the corporate president refused to do so, the court held that the entry of a transfer of shares of stock on the books of the corporation was not

necessary to the validity of the transferee's title, which becomes absolute on the delivery to him of the certificate and with an assignment of the shares indorsed by the owner. The *McLean* Court ruled:

> Under our statute and the decisions of this court, plaintiff was the absolute owner of the stock, and possessed the evidence of title. He thereby became a stockholder, had the right to attend meetings, to share in the profits, and, in fact, was entitled to all the rights of every other stockholder, notwithstanding the refusal of the president to register the transfer. He could by the proper proceedings have compelled the proper officers of the defendant to register and transfer. The statute provides that shares of stock may be transferred by indorsement and delivery of the certificates thereof, and that such transfers are valid between the parties thereto. **Under this statute it is held that the transfer upon the books is not necessary to the validity of the purchaser's title.** *(Emphasis added)*. *Id.* at 69.

In sum, the Appellants contend that based on the unique facts and circumstances presented in this case that the transfer occurred once the Third Party received the authorized written instructions expressing the Principal's intention to transfer his last remaining five shares to his two sons, and therefore, those shares never belonged to the decedent's estate. Alternatively, case law strongly favors the equitable and legal remedies available when a transfer agent or a corporation fails to transfer stock at the request of the owner or owner's agent. See e.g., *Robinson v Robson*, 297 Mich 119; 297 NW 208 (1941)(stock owner had adequate remedy at law); *Atherton v Michigan Guaranty Corporation*, 237 Mich 133; 211 NW 83 (1926)(action in equity and for accounting for

dividends).

In addition as stated in the Restatement Agency, *supra*, the authorized acts of the Agent could have bound the estate to the extent that the estate can ratify the acts of the Agent. To illustrate in *Henritzy v General Elec Co*, 182 Mich App 1, 451 NW2d 558 (1990), the court examined the general agency laws as they pertain to acts of agent after the principal has died. The *Henritzy* Court held:

> We next note that it has been stated that the rule in Michigan is that the authority of an attorney is revoked when the attorney-client relationship is terminated when the client dies. See *Wright v Estate of Treichel*, 36 Mich App 33, 36, 193 NW2d 394 (1971). Since plaintiff died shortly before the settlement agreement was placed on the record, defendant contends that plaintiff's attorney acted beyond his authority when he entered into the settlement agreement. Although that may be true, the issue presented is whether the attorney's alleged unauthorized act may be ratified. We hold that it may be. The lower court relied on agency principles and the theory of ratification to uphold the settlement and we find no abuse of discretion in the lower court's doing so. Ratification has been defined as the confirmation of a previous act done by the party himself or by another and the affirmance by a person of a prior act which did not bind him, but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him. Black's Law Dictionary (5th ed), p 1135.
>
> 1 Restatement Agency, 2d §§ 84, p 213, in setting forth what acts can be ratified, provides:
>
> (2) An act which, when done, the purported or intended principal could not have authorized, he cannot ratify, except an act affirmed by a legal representative whose appointment relates back to or before the time of such act.
>
> Moreover, Comment e, p 217, provides:
> e. *Ratification by executors and similar representatives.* An executor, administrator, assignee, trustee in

bankruptcy, or other representative whose title, when appointed, relates back to an earlier time, can ratify acts which he could have authorized had he been appointed at such an earlier time.

In addition, Illustration 11, p 217, provides:

> 11. B dies. His former agent, A, in ignorance of his death, executes his former authority by purchasing goods from T in B's name. Thereafter P is appointed administrator and empowered to continue B's business. P affirms. The purchase from T binds the estate. *Id.* at 9.

Here, the personal representative of the estate may still ratify the acts of the Agent in the transfer of the remaining shares. Under Michigan's power of attorney act, MCL 700.495, the following provision is relevant:

> . . . . An act done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees, and personal representative as if the principal were alive, competent, and not disabled. . . .[2]

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[2] Michigan repealed this section constituting the Uniform Durable Power of Attorney Act and reenacted the provisions in the Uniform Probate Code, MCL Sections 700.5501-700.5505 by P.A. 1998, NO. 386, effective April 1, 2000.

CONCLUSION AND RELIEF REQUESTED

The Agent was instructed by his dying father to finish his final estate planning desires by transferring his last remaining shares of the joint venture to his two sons so that his estranged daughter would not inherit from him and to avoid the costs and heartaches of probate. Given the unique nature of this joint venture, the transfer was completed when the Agent fully performed his authorized acts by transmitting his father's written desires and the durable power of attorney. The Third Party had four days to write in its ledger books the new owners' names before the Principal died. Any dependence on and unnecessary delay caused by the Third Party should not be sufficient to frustrate the Principal's death plans. The Agent fully performed and the Third Party had all required and necessary documents to complete the transaction.

The general rule that an agent's authority to act terminates upon the death of the principal, unless coupled with an interest, has been poorly extrapolated into an unclear and confusing area of agency law. This confusion has broadly and unwisely established the thought pattern that death of a principal terminate all future and *past* authorized acts. As for the latter, agents can not enter into final settlement agreements, cannot accept cash from a debtor, or accept delivery on behalf of the principal. The major problem with this extrapolation is that in these examples, the agent's actions are undertaken for the direct benefit of the principal, who has since died. Instead, an estate would have to be created and

the personal representative would have to be cloaked with legal authority. The difference in this case, however, is that the Principal would not be receiving the direct benefit; only the donees or beneficiaries would.

The better rule of law as it pertains to clearly authorized acts of an agent with unambiguously established intentions of a principal is to enforce the authorized acts of the agent regardless of whether the principal died in the interim. It is common sense and sound judgment to clarify this general rule of law so that third parties having received authorized instructions by an agent at the bequest on a principal can reasonably rely on those acts without having to second guess whether to complete the transactions. In addition, given the many and swift electronic means of communication in contemporary times, it is abundantly critical that third parties be able to rely on last minute communications from attorneys in fact and agents. Trade and commerce depends on reliable forms of communications, and in addition, businesses with long-established practices and customs should be permitted to exercise the methods of title transfers.

Finally and in the alternative, even if the transfers were not completed and the assets were apart of the estate, the estate may still ratify the Agent's acts.

The Appellants herein request that this Honorable Court reverse the Court of Appeals decision and enter an order affirming the trial court decision.

Date: August 18, 2003

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